

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

**IN RE: AMENDMENT TO COURT OF CHANCERY RULES, SECTION
 XVI, RULE 174**

This 15th day of December 2014, IT IS HEREBY ORDERED that Court of Chancery Rules, Section XVI shall be amended by deleting Rule 174 in its entirety, and adding the following language, effective January 1st, 2015.

Rule 174 shall be amended as follows:

Rule 174. Mediation.

(a) *Scope and Purpose.* The term “mediation” means the process by which a neutral mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution. The scope of the mediation includes all contacts and communications between the mediator and any party or parties, or among the parties, from the time of the referral to mediation until its conclusion. The purpose of mediation in the Court of Chancery is to provide the parties with convenient access to a dispute resolution mechanism that is fair, confidential, effective, inexpensive, and expeditious. This rule shall be interpreted in accordance with its purpose. This rule does not apply to mediation proceedings for technology disputes and business disputes pursuant to 10 Del. C. §§ 346 and 347, which proceedings are governed by Rules 93-95.

(b) *Voluntary Mediation.* In any type of matter, with the consent of the parties, the Court may enter an order referring the matter or any issue for mediation before a judicial mediator or a non-judicial mediator. A member of the Court of Chancery or a Master sitting permanently in Chancery who has had no prior involvement in the case may serve as a judicial mediator. Any impartial individual may serve as a non-judicial mediator. A non-judicial mediator need not be an attorney.

(c) *Mandatory Mediation.*

(1) In an adult guardianship, trust, or probate matter, without the consent of the parties, the Court may enter an order referring the matter or any issue for mediation before a judicial mediator or a non-judicial mediator. If the reference is to a non-judicial mediator, then the parties shall select a mediator by stipulation within twenty (20) days of the referral. If the parties are unable to agree, the Court will appoint a non-judicial mediator.

(2) Upon the filing of any dispute involving deed covenants or restrictions under 10 Del. C. § 348, the parties to the dispute shall be assigned to mandatory mediation. The judicial officer assigned to the action shall appoint a mediator by court order. Mediation shall commence within sixty (60) days of the filing of the

action. In order to receive expedited treatment under this rule, a plaintiff or petitioner must attach to the complaint a certification that the case is eligible to proceed under 10 *Del. C.* § 348.

(3) In any action involving mandatory mediation, the mediator shall set the date and time of the mediation and shall notify the parties of the date and time by certified and U.S. Mail at least 13 days in advance of the scheduled mediation. Parties to mandatory mediation are required to participate in the mediation in good faith and may not withdraw or adjourn the mediation without the consent of the mediator.

(d) *Stay of Pending Litigation.* Upon order of the Court, proceedings in a matter referred to mediation may be stayed pending the conclusion of the mediation.

(e) *Mediation Agreement.* The parties to a mediation may enter into a written mediation agreement that identifies the issues to be mediated, specifies the methods by which the parties shall attempt to resolve the issues, identifies the mediator, and addresses the parties' responsibility for any fees and costs of mediation together with such other matters as the parties may deem appropriate. The provisions of this Rule are deemed incorporated by reference in the mediation agreement.

(f) *Client Participation.* An authorized representative of the client shall participate in the mediation. The client representative shall have authority to resolve the matter fully. The client representative shall not be a lawyer who has entered an appearance in the matter referred to mediation. The mediator may waive or modify the client participation requirement.

(g) *Confidentiality.*

(1) Mediation is a confidential proceeding. Unless all parties consent, only the mediator, the parties, and their representatives may participate in the mediation.

(2) Except for the order of referral, the record of the mediation is confidential and not available for public access. The Register in Chancery will not include any mediation materials as part of the public docketing system.

(3) All memoranda, work product, and other materials contained in the files of the mediator are confidential. All communications made in or in connection with the mediation that relate to the controversy being mediated, whether with the mediator or a party during the mediation, are confidential.

(4) Information received from other parties during the mediation that the recipient does not already have or that is not public shall be used only for the mediation and not for any other purpose.

(5) The confidentiality of the mediation can be waived only by a written agreement signed by all parties and the mediator.

(h) *Limitation on Discovery.*

(1) Mediation proceedings are not subject to discovery.

(2) The mediator and any participant in the mediation may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to the mediation.

(3) Any memoranda, work product, or other materials contained in the mediator's files are not subject to discovery. Any communications made during or in connection with the mediation that relate to the controversy being mediated, whether with the mediator or another participant in the mediation, are not subject to discovery.

(4) The limitation on discovery shall not extend to the mediation agreement, any settlement agreement, any evidence provided to the mediator or exchanged in the mediation that otherwise would be subject to discovery, and any memoranda, reports, or other materials provided to the mediator or exchanged in the mediation that were not prepared specifically for use in the mediation.

(i) *Scope of Mediator's Authority.* The mediator shall have no authority to make any adjudication relating to the matter or issue referred for mediation. The mediator shall have authority to take any of the following actions:

(1) Convene an initial conference or teleconference to obtain information from the parties and address logistical matters;

(2) Determine the time and place of mediation;

(3) Direct the mediating parties to provide submissions, including confidential submissions, to assist the mediator in the mediation;

(4) Speak privately with any participant or a subgroup of the participants in the mediation;

(5) Terminate the mediation if the parties are unable to agree;

(6) Waive, modify, or allocate the court costs in a mediation conducted by a judicial mediator in light of the parties' economic circumstances or for good cause shown; and

(7) A judicial mediator may impose the costs of the mediation on a party who the mediator believes has failed to mediate in good faith. A mediator shall not have authority to impose any other sanction or penalty.

(j) *Settlement Agreement.* If the parties reach agreement regarding the matter or issue referred to mediation, then the parties shall reduce their agreement to writing in the form of a settlement agreement signed by the parties. The settlement agreement shall address the nature of any filings necessary to dismiss or proceed with the underlying action. The settlement agreement may provide for some or all of the terms of the agreement to be implemented by court order in the underlying action. If the settlement agreement resolves the entire case and does not require judicial approval, the parties may keep the terms of the settlement confidential and file a stipulation of dismissal in the underlying action.

(k) *Report to Court.* The mediator shall report to the Court that the mediation has resulted in a settlement or has not resulted in a settlement. The mediator may report to the Court that the parties are continuing to mediate, in which case the mediator may advise the Court of the schedule for the mediation. In a mediation conducted by a judicial mediator, the judicial mediator shall advise the Court of the number of days of mediation so that court costs may be assessed. If any fees or costs are shifted or allocated among the parties, whether by agreement or because of a determination by the mediator, then the mediator shall inform the Court of the scope of each party's obligation. The mediator shall not provide the Court with any information about the conduct of the mediation, including the mediator's view regarding whether any party failed to mediate in good faith.

(l) *Compensation and Court Costs.* A non-judicial mediator shall be compensated at the rate and in the manner agreed upon by the parties. A judicial mediator shall not be compensated. At the conclusion of the mediation in any civil action or matter involving a trust, the parties shall be assessed an additional court cost in the amount of \$5,000 for each day or partial day of mediation with a judicial mediator. At the conclusion of the mediation in any guardianship matter, probate dispute or dispute involving a deed covenant or restriction, the parties shall be assessed an additional court cost in the amount of \$1,500 for each day or partial day of mediation with a judicial mediator. No additional court cost shall be incurred for a judicial mediator's initial teleconference with the parties or for time spent by a judicial mediator preparing for the mediation. Court costs relating to mediations shall be deposited in a separate account maintained by the Court of Chancery and shall be used from time to time at the discretion of the Chancellor for mediation training or other Court-related purpose. If the State or an agency of the State is a participant in mediation with a judicial mediator, the portion of the court costs allocated to the State shall be waived by the Court.

(m) *Civil Immunity.* A mediator is immune from civil liability arising out of or relating to a mediation absent a showing of bad faith.

IT IS FURTHER ORDERED that Court of Chancery Rules, Section XVI shall be amended by deleting Rule 174.1 in its entirety, effective January 1, 2015.